September 29, 2017

Mr. Christopher Kirkpatrick
Secretary
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: U.S. Commodity Futures Trading Commission Request for Public Input on Simplifying Rules, Project KISS (RIN 3038-AE55)

Dear Mr. Kirkpatrick:

The Coalition for Derivatives End-Users (the "**Coalition**")[1] appreciates the efforts of the U.S. Commodity Futures Trading Commission (the "**CFTC**" or the "**Commission**") and its staff in conducting an agency-wide internal review of the Commission's existing rules, regulations and practices with a view towards making them simpler and less costly with which to comply.[2] The Coalition strongly supports the Commission's efforts—which the Commission has titled *Project KISS*—and the Commission's general objective to reduce the drag that its derivatives regulatory regime may have on the American economy. End-users are the engines of that economy. Accordingly, any regulatory reform measures contemplated by the Commission (and other financial regulators) should promote economic stability and transparency without imposing undue burdens on end-user companies.

When Congress enacted the reforms in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act and subsequent amendments thereto ("**Dodd-Frank**" or the "**Dodd-**

[1] Since 2009, hundreds of companies and industry trade associations have been active in the Coalition on both legislative and regulatory matters impacting end-user companies' use of derivatives. End-user companies employ derivatives and derivatives strategies primarily to manage risks, enhance their competitiveness and provide stable pricing to their customers. The Coalition firmly believes that imposing burdensome and costly derivatives regulation on end-users—parties that did not contribute to the 2008-2009 financial crisis—fuels economic instability, restricts job growth, decreases productive investment and otherwise hampers U.S. competitiveness in the global economy.

[2] CFTC, Request for Information, *Project KISS*, 82 Fed. Reg. 23765 (May 24, 2017). The Commission notes that Project KISS was initiated to be responsive to President Donald J. Trump's executive order dated February 24, 2017, which directed federal agencies to designate a Regulatory Reform Officer and establish a Regulatory Reform Task Force focused on regulatory reform in order to stimulate U.S. economic growth. *See* President Donald J. Trump, Executive Order 13777 (issued Feb. 24, 2017), *Enforcing the Regulatory Reform Agenda*, 82 Fed. Reg. 12285 (Mar. 1, 2017), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-03-01/pdf/2017-04107.pdf. While Project KISS is consistent with the principles of Executive Order 13777, the Commission is not directly covered by the order as a federal agency.

Frank Act"), Congress intended to exempt end-users from the reach of swaps regulation.[3] Yet, in the implementation of certain Commission regulations and staff guidance under Dodd-Frank, end-users have been burdened with a range of unintended consequences. We applaud CFTC Chairman J. Christopher Giancarlo's statements accompanying the issuance of the Project KISS initiative that acknowledge these unintended consequences. Specifically, Chairman Giancarlo noted that "[a]t times the CFTC rules are unnecessarily complex, and the harder they are to understand and costly to follow . . . goods we buy like groceries, heating oil and airline tickets get more expensive because their production prices cannot be easily hedged."[4]

On the Commission's web portal for Project KISS, it has identified and requested public input across the following five subject areas where the implementation of the Commission's existing rules, regulations and practices could be modernized and simplified: (I) Reporting; (II) Clearing; (III) Execution; (IV) Registration; and (V) Miscellaneous.[5] For your convenience, we have organized our comments to Project KISS under each of those subject areas.

I. REPORTING

Dodd-Frank created a single-sided swap reporting regime in which the burdens to report data generally fall on the swap dealer or financial entity counterparty to the swap transaction. As a result, most end-users are not "reporting counterparties" under the relevant Commission's swap data reporting regulations found in Parts 43, 45, 46 and 49 of the CFTC's regulations (collectively, the "**Reporting Rules**") and thus, typically do not have any direct reporting obligations with respect to their external swaps.[6] End-users would be considered "reporting counterparties" with direct reporting burdens for their inter-affiliate swap transactions; however, the Commission has provided conditional no-action relief to alleviate such reporting burdens.[7] The Coalition firmly believes that the Commission's single-sided reporting regime is the best and most efficient means

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[3] Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376, Pub. Law 111-203 (July 21, 2010), as amended; Business Risk Mitigation and Price Stabilization Act of 2015, 129 Stat. 3, Pub. Law 114-1 (Jan. 12, 2015), which amended Section 731 of the Dodd-Frank Act.

[4] CFTC Press Release, *CFTC Requests Public Input on Simplifying Rules*, *Project KISS Enters New Phase*, Remarks of then-Acting Chairman J. Christopher Giancarlo, pr7555-17, May 3, 2017 *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7555-17. The Commission's press release notes that Project KISS's primary focus is on streamlining the implementation of existing regulations and practices, rather than on re-writing or repealing those rules and regulations. Chairman Giancarlo's remarks are consistent with views he has shared since becoming a CFTC commissioner. In Congressional testimony before the U.S. House Committee on Agriculture, Subcommittee on Commodity Exchanges, Energy and Credit, then-Commissioner Giancarlo noted that "[i]t is our job at the CFTC to make sure that our rules do not treat [end-users] as though they were the cause of the crisis." Written Testimony of Commissioner Christopher Giancarlo before the U.S. House Committee on Agriculture, Subcommittee on Commodity Exchanges, Energy and Credit, Apr. 14, 2015, *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlos-5.

[5] CFTC Project KISS Web Portal *available at* https://comments.cftc.gov/KISS/KissInitiative.aspx.

[6] 17 C.F.R. Parts 43, 45, 46 and 49 (2017).

[7] *See* CFTC No-Action Letter No. 13-09 (Apr. 5, 2013) *available at* http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/13-09.pdf.

for regulators to obtain high quality data. While swap data repositories ("**SDRs**"), reporting counterparties and other affected stakeholders have undertaken substantial efforts in good faith towards implementing and complying with the Reporting Rules to date, there is broad industry consensus that certain aspects of those rules are overly prescriptive, unnecessarily complex and have resulted in the reporting of inconsistent and suboptimal swap data.

The Coalition recently provided comments to the Division of Market Oversight ("**DMO**") of the Commission in connection with DMO's *Roadmap to Achieve High Quality Swaps Data* (the "**Roadmap**").[8] As noted in our comments to the Roadmap,[9] the Coalition supports DMO's efforts to examine whether the CFTC's Reporting Rules are meeting the standards established at the Pittsburgh G20 Summit and codified in the Dodd-Frank Act.[10] Each of the Coalition's comments to the Roadmap is equally relevant and responsive to the Project KISS initiative. In particular, the Coalition believes that the Commission should similarly consider the following three reforms with respect to its Reporting Rules: (1) codify staff guidance and no-action relief related to its Reporting Rules, where appropriate; (2) harmonize U.S. and non-U.S. reporting obligations and data elements, where appropriate; and (3) ensure that any reforms to the Reporting Rules are appropriately timed.[11]

1. Codify Staff Guidance and No-Action Relief, Where Appropriate

In order to address many of the compliance challenges and difficulties arising out of the Commission's accelerated efforts to finalize its Reporting Rules and other related regulations promulgated under the Dodd-Frank Act, DMO staff was subsequently impelled to issue a series of no-action letters and interpretive guidance to SDRs, reporting counterparties and market infrastructure providers. In total, DMO staff has issued 63 swap data reporting-related letters and

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[8] Division of Market Oversight, CFTC, *Roadmap to Achieve High Quality Swaps Data*, July 10, 2017, *available at* http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/dmo_swapdataplan071017.pdf.

The Roadmap solicited public input in response to a plan to amend Parts 43, 45 and 49 of the Commission's regulations (and not Part 46).

[9] The Coalition's comments are available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61292&SearchText=

[10] Organization for Economic Co-operation and Development, Leaders' Statement: The Pittsburgh Summit, G20 (Sept. 24-25, 2009).

[11] In addition to the Coalition's comments with respect to the Commission's Reporting Rules, we respectfully request that the Commission consider making a change to the large trader reporting filing deadline for CFTC Form 204 from the last Friday of the month to the last day of the month. Certain Coalition end-user companies that engage in significant futures and options trading in the grains market have experienced unnecessary and resource-heavy burdens in complying with the existing filing deadline in CFTC regulation 19.01 since the filing process could occur anywhere from the 22nd to the 31st day, depending on the month and year. Moving the CFTC Form 204 filing deadline to the last day of the month would materially reduce these end-user companies' reporting burdens by allowing them to align their large trading reporting obligations with their other month-end processes, reducing complexity and promoting consistent reports. In addition, changing the filing deadline in this manner would harmonize the Commission's large trader reporting and recordkeeping requirements with corporate financial reporting and recordkeeping obligations.

guidance following the Commission's adoption of the Reporting Rules. Rather than having a patchwork of permanent and temporary no-action letters, we believe that in furtherance of Project KISS's objectives the Commission should adopt as final rules the substance of the relief granted through both time-limited and permanent Commission's no-action letters and guidance relating to reporting obligations. We urge, however, that in adopting the substance of the various relief and guidance, the Commission do so in such a way that promotes efficiency, market certainty and reduces the number of prescriptive conditions imposed on qualifying parties, all while maintaining the integrity of reported swap data. To do otherwise would defeat the intended goals of the Roadmap and would be inconsistent with the objectives of Project KISS.

By way of example, certain Coalition members rely on the conditional relief in Commission staff no-action letter 13-09 ("**Letter 13-09**"), which grants, among other things, an exemption from swaps reporting under Part 45 for inter-affiliate swap transactions.[12] Financial and non-financial end-users use inter-affiliate swaps as a risk management best practice to manage internal risks of the enterprise. While Coalition members are very appreciative of the relief provided in Letter 13-09, such relief is only available where a swap transaction meets a series of onerous conditions, including that all swaps entered into "between either one of the affiliated counterparties and an unaffiliated counterparty (regardless of the location of the affiliated counterparty) must be reported to an SDR registered with the Commission, pursuant to, or as if pursuant to parts 43, 45, and 46 of the Commission's regulations."[13] This condition effectively extends the Reporting Rules to cross-border transactions. In particular, the condition forces an end-user seeking relief to report all of their external swaps to a U.S. SDR even when those external swaps are not required to be reported to a U.S. SDR. Other conditions in Letter 13-09 are also unnecessarily restrictive such as the distinction between wholly and majority-owned affiliates and the condition explaining that the use of the inter-affiliate clearing exception denies the ability of an end-user to elect the relief in Letter 13-09. The underlying concerns with each of the above-referenced conditions ignore the fact that inter-affiliate transactions have no market impact and fail to consider the practical realities of how end-users use derivatives for risk management within a corporate group.[14]

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[12] *See* Letter No. 13-09 at 4-8.

[13] *Id* at 5.

[14] Other jurisdictions have recognized the importance of exempting inter-affiliate transactions from reporting obligations and have proposed to address the concerns raised by industry. For instance, the European Union has recently proposed a blanket exemption for reporting of inter-affiliate swaps. *See* European Commission, Proposal for a Regulation of the European Parliament and of the Council, amending Regulation (EU) No 648/2012, COM (2017) 208 final (May 4, 2017), *available at* http://www.europarl.europa.eu/RegData/wdocs_autres_institutions/commission_europeenne/com/2017/0208/COM_COM(2017)0208_EN.pdf. ("Intragroup transactions involving any NFCs should be exempted from the reporting obligation. Given the nature and limited volume of such trades, this has the advantage of significantly reducing the costs and burdens of reporting for those counterparties that are the most disproportionally affected by the requirement, while the resulting very limited loss of data will not significantly affect authorities' ability to monitor systemic risk in the OTC derivative markets.")

2. **Harmonize U.S. and Non-U.S. Reporting Obligations and Data Elements, Where Appropriate**

As proposed in the Roadmap, we support the harmonization of the CFTC's reporting obligations and reportable data fields with those required by the European Securities Market Authority and other foreign regulatory authorities, where appropriate. It is our view that harmonization of reporting obligations and reportable data fields also furthers the objectives of Project KISS. The differences between various reporting rulesets make reporting complex and costly for global derivatives users and present significant obstacles for the aggregation of derivatives data in order to better understand global derivatives trading activity. Indeed, the Coalition further believes that harmonization is absolutely critical for the successful and efficient functioning of global swaps markets. Moreover, we encourage the Commission to work with global regulators towards substituted compliance and reciprocal equivalence determinations related to reporting and enhanced information sharing agreements that provide for the increased sharing of swaps data among regulators.[15]

We would also note that at a domestic-level, there are several instances where the Commission and the U.S. Securities and Exchange Commission ("**SEC**") would require market participants to report different data fields and to use different parameters in determining which trades are subject to reporting. Since many market participants and SDRs participate in both swaps and security-based swaps markets, we believe that the Commission should endeavor to align the Reporting Rules with the SEC's security-based swap reporting rules. Further, consistency between the CFTC and the SEC will help in achieving global harmonization when working with non-U.S. regulators. We respectfully request that Commission staff coordinate closely with SEC staff in order to develop consistent reporting obligations, which would ultimately reduce the ineffectual differences between the two rulesets.

3. **Ensure that Any Reforms to the Reporting Rules Are Appropriately Timed**

We believe that the Commission's efforts to amend the Reporting Rules under the Roadmap and pursuant to Project KISS should not be burdened by an artificially imposed deadline at the expense of compromising quality and uniformity of data reporting. Specifically, the Roadmap provides that the Commission expects full compliance with revised final rules by the end of 2019. We respectfully urge that the Commission not rush its public consultation and analysis and that staff spend an appropriate amount of time necessary to ensure that the Commission's Reporting Rules successfully meet the Roadmap's goals and the objectives of Project KISS.

[15] Our recommendation with respect to reporting is consistent with our broader recommendations for the Commission's increased usage of substituted compliance and mutual recognition as discussed below in Section V.2.A. of this letter.

II. CLEARING

Mandatory swap clearing is one of the fundamental tenets of the Dodd-Frank Act.[16] The Commission's first clearing mandates went into force in 2013 and, as of today, a large proportion of the U.S. interest rate derivatives and credit default swap index markets are now centrally cleared.[17] The Dodd-Frank Act directed the Commission to provide an exception from the mandatory clearing requirements for non-financial end-users. Since the Commission's adoption and implementation of its mandatory clearing final rules, the Coalition has worked closely with the Commission to ensure that the end-user clearing exception and other staff-issued exemptive relief affords end-user companies with a mechanism to efficiently manage their business risks, invest in the American economy and create jobs without being unduly burdened by costly regulatory obligations.

While the Commission has implemented these important exceptions and exemptions for the benefit of non-financial end-users, the implementation of many of these new rules have given rise to some unintended consequences resulting in the constriction of American business investment, acquisitions, research, development and job creation. As part of the Project KISS initiative, we believe that the Commission should amend the exceptions and exemptions to the Commission's mandatory clearing requirement in the following ways to promote efficiency and reduce the drag on the engine of the American economy: (1) eliminate the requirements to submit annual reporting certifications to SDRs or to the Commission; (2) support legislative reforms to the definition of "financial entity" for the purposes of the Commission's clearing exceptions and exemptions; (3) provide a consistent treatment of securitization vehicles; and (4) maintain existing Commission staff no-action relief for centralized treasury units ("**CTUs**") and support a legislative fix to the companion statutory relief that was intended to address the same concerns. Each of these recommendations is explained in greater detail below.

1. Eliminate the Requirements to Submit Annual Reporting Certifications

The Coalition and its members believe that annual requirements found in the Commission's end-user exception final rulemaking,[18] its inter-affiliate clearing exemption final rulemaking[19] and in various staff-issued no-action letters[20] are unnecessarily time-consuming and overly burdensome. Accordingly, we respectfully urge the Commission and Commission staff to amend the frequency with which electing parties would be required to take action in order to continue to elect the relevant exception or exemption.

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[16] Commodity Exchange Act ("**CEA**") section 2(h), 17 U.S.C. § 2(h) (2017).

[17] *See* CFTC Swaps Report, Gross Notional Outstanding by Cleared Status (Millions of USD) - Open Interest Equivalent (Single-Count), *available at* http://www.cftc.gov/MarketReports/SwapsReports/L1GrossExpCS.

[18] *See* 17 C.F.R. § 50.50(b)(2).

[19] *See* 17 C.F.R. § 50.52(c).

[20] *See, e.g.*, CFTC Staff No-Action Letter 14-144 (Nov. 26, 2014); CFTC Staff No-Action Letter 15-27 (May 4, 2015); CFTC Staff No-Action Letter 16-81 (Nov. 28, 2016).

With respect to the annual reporting requirement, the Dodd-Frank statutory and Commission issued clearing exceptions and exemptions provide that a party must submit an annual notice of its ability to elect not to clear swaps subject to mandatory clearing. In general, the annual submission must include: (i) information identifying the basis upon which the party is electing the exemption (i.e., the party is not a "financial entity;" the party is an eligible affiliate; the party qualifies as an exempt cooperative, etc.); (ii) with respect to the end-user exception, whether the swaps for which the electing counterparty is electing the exception are used to hedge or mitigate commercial risk; (iii) how the electing counterparty generally meets its financial obligations with respect to uncleared swaps; and (iv) for an electing counterparty that issues securities registered under Section 12 of the Securities Exchange Act of 1934 or is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (such party, an "**SEC Filer**") that its board of directors (or an appropriate committee of its board of directors) has reviewed and approved the decision to enter into uncleared, bilaterally executed swaps. All of this information is required to be submitted to an SDR or to the Commission on an annual basis in anticipation of electing the exception or exemption for some or all swaps subject to mandatory clearing over the upcoming year.[21] If the electing counterparty chooses not to make the annual filing, such information must be reported to an SDR or to the Commission on a swap-by-swap basis by the reporting counterparty. In practice, most end-users or their counterparty's (on the end-user's behalf) report this information annually to an SDR; however, because the exceptions from mandatory clearing are elected on a swap-by-swap basis by the electing counterparty, it should be presumed that such electing counterparty satisfies the elements for claiming such an exception or exemption from mandatory clearing. Accordingly, an annual certification of such availability does nothing to change this requirement of compliance and the information provided in the annual certification is very unlikely to change. Further, an end-user's counterparty obtains the relevant information from the end-user at the outset of any trading relationship through the exchange of bilateral documentation or protocols and in that documentation the end-user makes the representations to notify the counterparty if any of the information becomes incorrect.

The cycle of complying with this requirement on an annual basis creates unnecessary regulatory risk, particularly when counterparties are reporting the information annually on behalf of end-users, and provides very little corresponding benefit to the Commission. We believe that a simpler and less burdensome approach would be to allow for electing parties to submit, on a one-time basis, the relevant information once to an SDR. Thereafter, an electing party would only need to submit a filing if any of the information previously provided or approved by the board is no longer accurate.

2. Support Legislative Reforms to the Definition of "Financial Entity" for the Purposes of the Commission's Clearing Exceptions and Exemptions

The Coalition firmly believes that Dodd-Frank's expansive definition of "financial entity" unfairly captures the hedging activities of certain end-users, which prevents these entities from

[21] Such reporting generally covers the subsequent 365-day period, and must be amended during that period only if there are any material changes to the information previously reported to the SDR or to the Commission.

qualifying for, or otherwise electing, clearing exceptions or exemptions.[22] Although these entities were not the source of the financial crisis, there are many derivatives market participants that—because of their status as financial entities—are denied relief afforded to non-financial end-user equivalents. This disparity in treatment results in an unreasonable outcome as these financial entities are engaged in the same derivatives activities as non-financial end-users (i.e., focusing on hedging legitimate commercial risks) and for those non-hedging derivatives activities, such amounts are either non-existent or *de minimis* when compared to the activities of more active market participants. Consistent with the goal of Project KISS to reduce unnecessary drags on the American economy, these end-users should not be so disadvantaged in the derivatives marketplace if they trade derivatives contracts for commercial hedging purposes and do not cross a *de minimis* threshold.

Chairman Giancarlo has publicly expressed his agreement with this view. In particular, he testified before Congress that the Commission's further interpretation of the term "financial entity" is "another example of an unreasonable burden placed on end-users is . . . [which] has led to the inadvertent capture of many energy firms as 'financial entities.'"[23] He further noted that "[a]s we have seen, imposing banking law concepts onto market participants that are not banks and that did not contribute to the financial crisis is not only confusing, but also adds more risk to the U.S. financial system."[24]

Accordingly, we request that the Commission support an amendment to the statutory definition of financial entity in CEA Section 2(h)(7)(C)(i), which would exclude a subset of the entities that use derivatives to hedge risk just like those non-financial end-users that currently fall outside of the definition. Amending the definition of "financial entity" in Section 2(h)(7)(C)(i) of the CEA would provide less of a drag on, and would ultimately strengthen, the American economy in two important ways.[25] First, amending this definition would enable American companies to be competitive with foreign firms in domestic and foreign markets. Foreign jurisdictions such as the

[22] This definition also prevents these entities from qualifying for exemptions from mandatory trading requirements and the requirements under the Commission's and U.S. prudential regulators' final uncleared margin rules. Our comments herein with respect to the Commission's clearing exceptions and exemptions equally apply to these other requirements.

[23] Written Testimony of Commissioner J. Christopher Giancarlo before the U.S. House Committee on Agriculture, Subcommittee on Commodity Exchanges, Energy and Credit, Apr. 14, 2015, *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlos-5.

[24] *Id*.

[25] 7 U.S.C. § 2(h)(7)(C)(i).

EU,[26] Switzerland,[27] Canada[28] and Singapore[29] have *de minimis* tests to ensure that certain entities are afforded exemptions based on their derivatives activities and not simply because they are financial in nature. As a result, there is an incongruous situation where entities that would qualify for exemptions from clearing, trading, and margin in foreign jurisdictions would not qualify under U.S. rules. Second, amending the definition would make regulation efficient, effective and appropriately tailored, which is consistent with one of the core objectives of Project KISS. The expansive financial entity definition unfairly captures and creates ambiguities for unregistered entities—including special purpose vehicles ("**SPVs**") and other similar end-user subsidiary structures—which use derivatives to hedge or mitigate commercial risks simply because of a broad definition that fails to consider the risk-reducing and non-systemic nature of such transactions.

3. Adopt Consistent Treatment of Securitization SPVs

Even in the absence of a legislative amendment to the financial entity definition under the Section 2(h)(7)(C)(i) of the CEA (which if amended could provide relief to securitization vehicles) as noted above, we believe that Commission staff should issue interpretive relief in support of exempting securitization SPVs from having to clear swaps used to hedge underlying commercial risks within the securitization structure.[30] Specifically, it is the Coalition's view that certain securitization SPVs should be permitted to take advantage of the end-user exception on a stand-alone basis when entering into a swap to hedge interest rate or foreign currency mismatches. The basis of our recommendation here is identical to our recommendation regarding legislatively amending the financial entity definition: removing unreasonable and unnecessary burdens for these end-users would reduce the drag on the American economy.[31]

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[26] European Market Infrastructure Regulation (EU) No 648/2012 (Dec. 12, 2012), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:052:0011:0024:EN:PDF.

[27] Swiss Financial Market Supervisory Authority, Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (June 19, 2015), *available at* https://www.admin.ch/opc/en/classified-compilation/20141779/index.html.

[28] Canadian Securities Administrators, National Instrument 94-101 (Jan. 19, 2017), *available at* http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20170119_94-101_derivatives.htm.

[29] Monetary Authority of Singapore, *Securities and Futures (Clearing of Derivatives Contracts) Regulations 2015*, chapter 289, *available at* http://www.mas.gov.sg/~/media/MAS/News%20and%20Publications/Consultation%20Papers/Annex%20B%20%20Securites%20and%20Futures%20Clearing%20of%20Derivatives%20Contracts%20Regulations.pdf.

[30] An SPV is a distinct legal entity, legally isolated from the sponsor or originator that created it, and operated in accordance with organizational documents and transaction documents that strictly limit its permitted activities as well as the types of liabilities the SPV may incur. Generally, SPVs have no other purpose than the transactions for which they were created, and the SPV can make no operational decisions beyond what is permitted within transaction documents.

[31] Somewhat related to our concerns regarding the treatment of securitization SPVs in the clearing context, the Coalition also believes that the Commission's margin requirements are inappropriately applied to swaps that are used to hedge risk within a securitization SPV and that are not able to clear through a clearinghouse, given the risks presented by such swaps. The Coalition respectfully urges the Commission to reconsider its implementation of the margin standards mandated in Section 731 of the Dodd Frank Act. In Section 731, standards for capital and margin are "to offset the greater risk to the swap dealer or major swap participant and the financial system

Additionally, there is precedent for providing this type of relief to securitization SPVs.[32] In particular, Commission staff has already provided relief in Letter 15-27 to qualifying SPVs, which are used in connection with a captive finance company's securitized financing.[33] Our current request would allow securitization SPVs outside of the captive finance company context to also be eligible to elect the end-user exception in instances where the SPV's activities and outward exposures are identical in nature to those of a SPV qualifying for relief provided by Letter 15-27. Without such an extension of relief, American companies are at a disadvantage that is unjustified because the structure of a securitization SPV protects swap dealers and major swap participants regardless of whether securitized assets relate to the purchase or lease of products manufactured by the SPV's parent company.

Finally, and from a practical standpoint, it is impossible and impracticable for most SPVs to meet margin calls because they are not structured with access to liquidity levels necessary to account for the uncertainty of fluctuating initial and variation margin call calculations. The SPV would need to be structured from the outset with the ability to post margin, and Coalition members have not identified a solution that is economically feasible and that does not present new risks to the financial system. Additionally, American companies that rely on securitizations for funding and asset-liability management are at a competitive disadvantage to foreign companies in accessing capital markets. As a result of the *de minimis* threshold provided by foreign jurisdictions—which we discussed in the previous section—only American securitization SPVs will be subject to mandatory clearing and margin requirements on risk-hedging swaps.

In the spirit of the Commission's Project KISS initiative to simplify and reduce unnecessary drags on the American economy, the Coalition believes the relief afforded to the securitization SPVs of captive finance companies should be extended to other securitization SPVs.

4. **Maintain Existing Staff No-Action Relief for CTUs and Support a Legislative Fix to the Statutory Relief That Was Intended to Address the Same Concerns**

The Coalition respectfully requests that Commission staff in the Division of Clearing and Risk continue to provide no-action relief to CTUs of non-financial affiliates from having to clear

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arising from the use of swaps that are not cleared, the requirement . . . [for capital and margin] shall (i) help ensure the safety and soundness of the swap dealer or major swap participant; and, (ii) be appropriate for the risk associated with the non-cleared swaps held as a swap dealer or major swap participant." Swap dealers and major swap participants entering into a swap with a securitization SPV are protected by their priority in payments, and are further protected by being provided a security interest in the pool of assets owned by the SPV.

[32] *See* CFTC No-Action Letter No. 15-27 (May 4, 2015) ("**Letter 15-27**") *available at* http://www/cftc/gov/ucm/groups/public/@lrlettergeneral/documents/letter/15-27.pdf. In Letter 15-27, Commission staff clarified that it is appropriate to consider the business of an SPV to be part of the business of the related captive finance company because: (i) the SPV is wholly-owned by the captive finance company; (ii) the SPV's financial statements are consolidated with those of the captive finance company; and (iii) the SPV's sole activity is facilitating financing undertaken by the captive finance company. Please note that the Coalition is neither opining on the appropriateness of the conditions imposed in Letter 15-27, nor requesting that those same conditions be used as the basis for Commission staff providing relief in this instance.

[33] *See id*.

their swaps that are subject to the Commission's mandatory clearing obligation, notwithstanding Congress' passage of an amendment to the CEA, which was intended to codify the relief.[34] In 2015, Congress amended CEA Section 2(h)(7)(D)[35] to codify relief provided to CTUs in Commission Staff No-Action Letter 14-144 ("**Letter 14-144**"). Letter 14-144 granted relief to qualifying CTUs from the Commission's mandatory clearing obligation if those CTUs met several conditional requirements. One of the conditional requirements in Letter 14-144 allowed a U.S.-based CTU to qualify for the relief to the extent that the CTU ring-fenced its non-U.S. swaps activities among non-financial and financial affiliates within the same corporate group (the "**ring-fencing requirement**").

Since the passage of the statutory amendment, however, end-users with global operations have experienced difficulty in satisfying the requirements in CEA Section 2(h)(7)(D)(iv)(II) because of a technical discrepancy between the language in the amended statute and Letter 14-144's ring-fencing requirement. That is, as enacted, Section 2(h)(D)(iv)(II) has created uncertainty as to whether a U.S.-based CTU seeking to qualify for the relief might be disqualified even where the CTU appropriately ring-fences its non-U.S. affiliates' swaps activities. As a result of this technical discrepancy, non-financial end-users continue to rely on the relief in Letter 14-144 as opposed to the revised statutory language in Section 2(h)(7)(D) given the differences in interpretation. For that reason, we ask that Commission staff continue to allow CTUs to rely on Letter 14-144 until such time as Congress enacts a technical fix to CEA Section 2(h)(7)(D)(iv)(II).[36] In addition, we request that the Commission support a legislative fix that may be proposed in Congress to address this discrepancy.

III. EXECUTION

In recent months, Chairman Giancarlo and DMO senior staff have indicated in both public and private *fora* that the Commission will propose reforms on how trading and execution of swaps on regulated trading platforms must occur.[37] Following the adoption and implementation of the

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[34] *See* CFTC Staff No-Action Letter 14-144 (Nov. 26, 2014), *available at*: http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/14-144.pdf.

[35] 7 U.S.C. § 2(h)(7)(D).

[36] The Coalition has supported previous legislation, like H.R. 1317, that would clarify such discrepancies. See H.R. 1317, 114th Cong. (2015), *available at* https://www.congress.gov/bill/114th-congress/house-bill/1317; Coalition Comment Letter, Subcommittee Hearing on Capital Formation and Reducing Small Business Burdens: Support for Derivatives End-Users Clarification Act, Coalition for Derivatives End-Users (Mar. 15, 2015), *available at* http://coalitionforderivativesendusers.com/uploads/sites/351/3.24.2015Coalition%20Letter%20to%20Senate%20Subcommittee%20on%20Securities%20Insurance%20and%20Inve....pdf; *see also* Coalition Comment Letter: Request for 4(c) Exemptive Relief from Clearing and Trade Execution Requirements for Centralized Treasury Units of Non-Financial End-Users, Coalition for Derivatives End-Users (Feb. 22, 2013), *available at* http://www.nam.org/Issues/Corporate-Finance-and-Management/Coalition-Letter-to-CFTC-Requesting-4(c)-Exemptive-Relief-for-Centralized-Treasury-Units/.

[37] *See, e.g.*, Remarks of Acting Chairman J. Christopher Giancarlo before International Swaps and Derivatives Association 32nd Annual Meeting, Lisbon, Portugal, *Changing Swaps Trading Liquidity, Market Fragmentation and Regulatory Comity in Post-Reform Global Swaps Markets* (May 10, 2017) *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-22; Keynote Address of CFTC Commissioner

Commission's existing swaps trading rules and DMO staff's release of various no-action letters and interpretive guidance, many within the swaps industry have argued that the Commission's swaps trading regime has caused significant market fragmentation and the resulting reduction of market liquidity.[38] The Coalition generally supports the Commission's expected efforts to reform its swaps trading regime in order to reverse these harmful and costly impacts to the global swaps market.[39] To date, the Coalition has not taken any formal positions with respect to the Commission's swaps trading regime primarily because the overwhelming majority of Coalition members qualify for an exception or exemption from both the Commission's mandatory clearing requirements and its mandatory trading requirements. However, we do not believe that all of the restrictions applied to swap trading are necessary to achieve the transparency benefits intended by such requirements.

Accordingly, the Coalition supports reforms to the Commission's swaps trading regime that are consistent with the principles outlined in then-Commissioner Giancarlo's extensive white paper published in January 2015, which analyzed the mismatch between the Commission's swaps trading regime and the distinct liquidity and trading dynamics of the global swaps market ("**Trading White Paper**").[40] In the Trading White Paper, Chairman Giancarlo asserts that Congress's swap trading statutory provisions in the Dodd-Frank Act laid out a straightforward and flexible framework, which was "suited to the episodic nature of swaps liquidity" and swaps market dynamics.[41] In contrast, he notes that the Commission's implementation of its swaps trading rules were out-of-step with congressional intent. Specifically, the Trading White Paper cited the following flaws in the Commission's swaps trading rules:

- Inappropriately adopts U.S.-centric futures regulatory model that supplants human discretion with overly complex and highly prescriptive rules;
- Largely incompatible with the distinct liquidity, trading and market structure characteristics of the global swaps markets;

J. Christopher Giancarlo before SEFCON VII (Jan. 18, 2017), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-19.

[38] *See, e.g.,* ISDA, *Cross-Border Fragmentation of Global Interest Rate Derivatives: Second Half 2015 Update* (May 10, 2016) *available at* http://www2.isda.org/attachment/ODM4NQ==/Fragmentation%20FINAL1.pdf ("The fracturing of the global interest rate swaps market that emerged in the aftermath of U.S. swap execution facility (SEF) rules coming into force in October 2013 shows no signs of reversing. Although concerns over market fragmentation have been apparent for almost three years, some liquidity pools continue to be split on U.S. and non-U.S. lines."); Colby Jenkins, Tabb Group, *Market Note: Global Swaps Liquidity Fragmentation 2016: Redefining the Balance* (June 2, 2016).

[39] 17 C.F.R. Parts 37 and 38 (2017).

[40] CFTC Commissioner J. Christopher Giancarlo, *Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank* (Jan. 29, 2015) *available at* http://www.cftc/gov/ucm/groups/public/@newsroom/documents/file/sefwhitepaper012915.pdf.

[41] *Id.* at 19.

- Fragments swaps trading into numerous artificial market segments and drives global market participants away from transacting with entities subject to the Commission's swaps regulation;
- Exacerbates the already inherent challenge in swaps trading, which is maintaining adequate liquidity and thus increasing market fragility and the systemic risk that the Dodd-Frank reforms were predicated on reducing; and
- Clearly circumvents the express requirements under Dodd-Frank.

To remedy these problems, the Trading White Paper proposed a new framework based on five basic principles.[42] The first principle in the Trading White Paper proposes that the Commission's reforms favor comprehensive regulatory oversight over a broad range of U.S. swaps trading activity in a much clearer and direct manner through the adoption of rules, which do not bury fundamental requirements in footnotes or subsequently issued staff guidance.[43] The second principle in the Trading White Paper proposes the removal of artificial distinctions (e.g., distinctions between "Required Transactions" and "Permitted Transactions") and instead suggests that the Commission's swap trading rules move towards a cohesive and undivided regulatory framework. The third principle proposes that the Commission abandon the rigidity and prescriptive nature of its current swaps regulatory regime in favor of more flexible rules in terms of the methods of trade execution, the evolution of products, market structure, the accommodation of beneficial swaps market practices and re-examining the way in which the Commission treats the statutory core principles.[44] The fourth principle proposes that the Commission address the need to impose higher standards of qualification and conduct for swaps professionals.[45] The fifth principle in the Trading White Paper proposes that the Commission focus its rules to enhance liquidity and price transparency, including by allowing a variety of execution methods.[46]

The Coalition supports each of these principles—which were put forth before the announcement of the Commission's Project KISS initiative—and the Commission's anticipated reforms to its swaps trading regime. We respectfully reserve providing specific comments, however, until such time as the Commission has proposed specific changes to its swaps trading rules.

IV. REGISTRATION

In connection with the Commission's regulations on registration, we respectfully urge the Commission to follow clear Congressional intent and promptly draft an interim final rule that makes clear that the swap dealer *de minimis* exception threshold shall remain at the $8 billion gross

[42] *Id.* at 63-64.

[43] *Id*.

[44] *Id*. at 65-69.

[45] *Id*. at 70-74.

[46] *Id*. at 74-76.

notional level.[47] The Dodd-Frank Act's swap regulatory regime requires swap dealers to register with the Commission and comply with significant new regulatory requirements if their swap dealing activities exceed an aggregate gross notional amount of $8 billion within the preceding 12-month period (the "***de minimis* threshold**").[48] Section 1a(49)(D) of the CEA and Section 1.3(ggg)(4) of the Commission's regulations provide that the *de minimis* threshold will automatically drop after December 31, 2017 to an aggregate gross notional amount threshold of $3 billion.[49] By a Commission-issued exemptive order extending the phase-in period for an additional year, the *de minimis* threshold will continue at the phase-in level of $8 billion.[50] The Coalition is concerned that any decrease below the current $8 billion level could reduce liquidity and the availability of counterparties for end-users to trade with, thereby concentrating risk in fewer counterparties and negatively impacting end-users' ability to hedge.

Many end-users choose a diverse group of counterparties to hedge these risks in order to find competitive pricing and to spread credit exposure over several counterparties. End-user counterparties may include larger registered swap dealers, as well as smaller entities that have limited dealing activities that fall below the $8 billion swap dealer *de minimis* threshold. Derivatives end-users rely on certain smaller market participants for limited dealing activities that may not otherwise be available or that may offer more competitive pricing.

The swap dealer *de minimis* threshold should continue to exclude swap dealing activities that do not rise to the level of systemic significance, either because of the level of activity or the type of transaction.[51] Lowering the threshold from the $8 billion gross notional amount would needlessly and unnecessarily capture a significant number of additional market participants and require them to register as swap dealers or, quite possibly, reduce their available products and services to derivatives end-users to ensure they remain below the thresholds. Any decrease from the current threshold would likely cause a further consolidation of swap dealing activities reducing competitiveness and potentially increasing risk. Such changes to the market would reduce liquidity to end-users and reduce counterparty selection. These results would run contrary to

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[47] The Explanatory Statement accompanying H.R. 2029, Consolidated Appropriations Act, 2016, which became law on December 18, 2015 "directs the Commission to comply with the directive regarding swap dealer de minimis in H.Rpt. 114-205." Explanatory Statement to H.R. 2029, Consolidated Appropriations Act, 2016, Division A, p.32, *available at* http://docs.house.gov/meetings/RU/RU00/20151216/104298/HMTG-114-RU00-20151216-SD002.pdf. This statement reaffirms the language in H.Rpt. 114-205 in which the "Committee directs the Commission to promulgate a rulemaking either maintaining the Swap Dealer de [m]inimis threshold at $8,000,000,000, the amount currently set forth in the regulation . . . pursuant to the results of the study currently being conducted as well as stakeholder input, within 60 days of enactment of this Act." H.Rpt. 114-205, p.76, *available at* https://www.congress.gov/114/crpt/hrpt205/CRPT-114hrpt205.pdf.

[48] 17 C.F.R. § 1.3(ggg)(4).

[49] *See* 7 U.S.C. § 1a(49)(D) (directing the Commission to establish a *de minimis* exception from the swap dealer definition); 17 C.F.R. § 1.3(ggg)(4).

[50] *See* CFTC Order, 81 Fed. Reg. 71605 (Oct. 18, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-25143a.pdf. Instead of dropping to a $3 billion dealing threshold on December 31, 2017, the swap dealer *de minimis* threshold will remain at $8 billion until December 31, 2018.

[51] Dodd-Frank requires that entities conducting a *de minimis* amount of dealing activity be exempted from the swap dealer and security-based swap dealer definitions. 7 U.S.C. § 1a(49)(D).

congressional intent and the Commission's stated objectives in reviewing its swaps rules under Project KISS.

V. MISCELLANEOUS

In the fifth and final section of our comments, we address concerns that Coalition members have arising out of some of the Commission's Dodd-Frank foundational rulemakings and interpretations. There were a number of foundational rulemakings that the Commission was directed to promulgate under the Dodd-Frank Act. Specifically, Dodd-Frank directed the Commission to act jointly with the SEC in defining key terms relating to jurisdiction such as the definition of "swap," "security-based swap," "swap dealer" and "security-based swap dealer." The Dodd-Frank Act also directed the Commission to consult with the SEC, U.S. prudential regulators and non-U.S. regulatory authorities on the establishment of consistent international standards for the swaps marketplace. Notwithstanding the fact that Congress and the Commission did not intend for the Commission's foundational rulemakings and interpretations to result in costly regulatory burdens that impact end-users' abilities to efficiently hedge and manage their risks, these foundational rulemakings and interpretations have created a number of costly impediments for end-users. In particular, derivatives end-users continue to have concerns regarding the following foundational matters: (1) the Commission's interpretation of the Dodd-Frank regulatory treatment of certain derivatives instruments; and (2) the scope of the Commission's authority over cross-border transactions and its consistency with statutory authority and judicial precedent. Each of these foundational matters and our recommendations in accordance with the objectives of Project KISS are discussed in greater detail in the subsections that follow.

1. Reinterpret the Dodd-Frank Treatment of Certain Derivatives Instruments

The Dodd-Frank Act established certain exclusions from the statutory definition of "swap" for qualifying derivatives instruments.[52] In 2012, the Commission and the SEC jointly issued further rules, guidance and interpretations to outline which derivatives instruments qualify for an exclusion from the definition.[53] There remain, however, a couple of specific types of derivatives instruments that certain end-users use to hedge their business risks, which could benefit from either additional guidance from the Commission or for the Commission to revisit its previous guidance and interpretations. In particular, the Coalition supports the Commission providing further or

[52] *See, e.g.*, 7 U.S.C. § 1a(47)(B)(ii).

[53] CFTC and SEC Final Rule, *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 Fed. Reg. 48207 (Aug. 13, 2012) ("**CFTC and SEC Joint Final Products Rule**").

revised guidance with regard to the following two specific derivatives instruments: (A) supply contracts; and (B) foreign exchange ("**FX**") window forwards.

A. *Supply Contracts*

Coalition members respectfully urge the Commission to finalize rules or guidance to make clear that certain supply contracts entered into by commercial entities should not be considered "swaps" because they are customary commercial arrangements, notwithstanding that they may have an option to take zero delivery.[54] These contracts are critical for end-users to ensure the adequate supply of natural gas and electric power and are closely tied to regulatory obligations in those markets.

In April 2016, the Commission and the SEC jointly issued for comment proposed guidance to address these concerns.[55] While the Coalition appreciates this proposed guidance, we respectfully ask the Commission to review the comments to the proposal and issue final guidance or rules that ensures the appropriate scope of contracts is covered by any such guidance. As the Commission recognizes in the preamble to the proposal, these supply contracts are necessary to keep generators running, do not pose a threat to the stability of financial markets and should not be regulated in the same manner as financial derivatives.

B. *FX Window Forwards*

The Coalition believes that the Commission should interpret FX window forward contracts as a qualifying "FX forward." While FX window forward contracts are based on the same principles as FX forward contracts—which are exempted from regulation as swaps—the Commission's current interpretation of these contracts treats them as swaps under the Commission's regulations. The current interpretation, therefore, discourages end-users from using a more tailored hedging tool that is functionally the same as an FX forward.

FX window forward contracts enable derivatives end-users to make better use of a fixed rate during calculations in their financial planning and provides end-users with more flexibility than a standard FX forward contract. FX window forward contracts are generally used by derivatives end-users when they do not know the specific date on which they will need the currency. For example, in situations where a derivatives end-user does not know when, within a certain date rate, a foreign supplier will ship a particular order.

Section 1a(19) of the CEA defines an "FX forward" as a "transaction that solely involves the exchange of 2 different currencies on a *specific future date* at a fixed rate agreed upon the inception of the contract covering the exchange" [emphasis added].[56] In an FX window forward contract, the counterparties physically exchange two currencies at a price agreed upon upfront

[54] *See* CFTC and SEC Joint Final Products Rule at 48246.

[55] CFTC and SEC, Proposed Guidance, *Certain Natural Gas and Electric Power Contracts*, 81 Fed. Reg. 20583 (Apr. 8, 2016), *available at* http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2016-08076a.pdf.

[56] 7 U.S.C. § 1a(19).

insured by a fixed exchange rate. Instead of the contract providing only one specific future date, however, the contract provides that the exchange will take place on one or more dates during an agreed time period or "window." We believe that the optionality with respect to the date on which delivery occurs should not cause the transaction that otherwise qualifies as a FX forward contract to be deemed a swap. Stated differently, we believe that this small difference is inconsequential and creates an unnecessary distinction, which results in higher hedging costs for end-users. We believe that the Commission has the authority to, and should, issue a similar interpretation for FX window forwards where the embedded optionality only applies to the delivery date(s). The Commission's issuance of an order to this effect would be consistent with one of Project KISS's objectives in reducing unnecessary regulatory costs placed on derivatives end-users.

2. **Cross-Border Transactions**

In addition to requesting that the Commission reexamine its positions on foundational matters related to certain product interpretations, the Coalition also respectfully requests that the Commission develop new policies regarding the application of its jurisdiction over cross-border transactions. In enacting Dodd-Frank, Congress recognized the potential for disputes between the United States and other jurisdictions in applying swap regulations globally. Dodd-Frank added Section 2(i) to the CEA, which provides that the Commission's swap regulations do not apply to activities outside the United States unless those activities, in part, have a direct and significant connection with activities in, or effect on, commerce of the United States or when they contravene such rules as the Commission may adopt to prevent evasion.[57]

The Commission issued a final interpretation and policy regarding the scope of its cross-border jurisdiction under CEA Section 2(i), which allows for compliance with a foreign jurisdiction's law and regulations if the Commission determines that the foreign regime's requirements are comparable to and as comprehensive as the Commission's regulations.[58] Notwithstanding the Commission's stated policy allowing for substituted compliance, many challenges currently exist in the application of the Commission's swaps jurisdiction to cross-border transactions due to the fact that the Commission's existing regulatory approach inherently ignores the effect of its regulations outside of the United States. The Coalition believes that the Commission's regulatory approach in respect of its jurisdiction over cross-border transactions should seek to avoid market fragmentation and prevent regulatory arbitrage between the United States and other jurisdictions.

To address these concerns in a manner consistent with the goals of Project KISS, we believe that the Commission should rely more heavily on substituted compliance and mutual recognition. In addition, we believe that the Commission should revisit its current policy positions regarding its cross-border jurisdiction more generally in a manner that allows for a principles-based approach

[57] 7 U.S.C. § 2(i).

[58] CFTC Final Interpretation, *Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations*, 78 Fed. Reg. 45291 (July 26, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-07-26/pdf/2013-17958.pdf ("**CFTC's Final Cross-Border Guidance**").

to cross-border compliance. We detail each of the foregoing recommendations in the subsections that follow.

A. *Substituted Compliance and Mutual Recognition*

The Coalition believes that it is critical for the Commission to more fully engage in assessments of the regulatory comparability of non-U.S. derivatives regulatory frameworks and provide exemptions based on those assessments. Actively embracing substituted compliance and mutual recognition across the Commission's various swaps rulemaking areas would avoid harming American businesses, which participate in the global derivatives market. We believe that any approach to substituted compliance and mutual recognition must be made on a flexible, outcomes-based approach. This approach is supported by international regulatory bodies including the Financial Stability Board, the OTC Derivatives Regulators Group[59] and the International Organization of Securities Commissions ("**IOSCO**").[60] This approach is also consistent with the statement of the G20 Leaders in 2013 that "jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory and enforcement regimes, based on similar outcomes, in a nondiscriminatory way, paying due respect to home country regulatory regimes."[61]

We acknowledge that the Commission has issued substituted compliance determinations with respect to its swaps rules. For example, the Commission and the European Commission adopted measures following an announcement on February 10, 2016 of their *Common Approach for Transatlantic CCPs*.[62] While we recognize the Commission's actions, the determination process followed a more prescriptive line-by-line rule analysis, which led to unnecessary delay and complexity. We believe that principles of international comity dictate a less disruptive, and more harmonized outcomes-focused approach.

We agree with Chairman Giancarlo that "the CFTC and its global counterparts must recommit themselves to work together to implement an equivalence and substituted compliance process . . . based on common principles in order to increase regulatory harmonization and reduce

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[59] Organization for Economic Co-operation and Development, *G20 Leaders' Declaration*, Sept. 2013, St. Petersburg at para. 71, *available at* https://www.oecd.org/g20/summits/saint-petersburg/Saint-Petersburg-Declaration.pdf. At the St. Petersburg Summit, the G20 Leaders agreed that "jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory and enforcement regimes, based on similar outcomes, in a non-discriminatory way, paying due respect to home country regulatory regimes."

[60] IOSCO Final Report, *IOSCO Task Force on Cross-Border Regulation*, Sept. 2015, IOSCO/MR/38/2015, *available at* https://www.iosco.org/news/pdf/IOSCONEWS400.pdf (advocating for an outcomes-based approach as opposed to a line-by-line comparison of rules).

[61] G20 Communique: Meeting of Finance Ministers and Central Bank Governors, Sydney, Feb. 22-23, 2014.

[62] CFTC and the European Commission, *Common Approach for Transatlantic CCPs*, (Feb. 10, 2016), *available at* http://www.cftc.gov/PressRoom/PressReleases/cftc_euapproach021016.

market balkanization."[63] We believe that ultimately such common principles are necessary to facilitate cross-border supervisory coordination. Foreign sovereigns have legitimate regulatory interests in the trading of swaps by multinational Main Street businesses in their local jurisdictions. The Commission must honor these principles in order to respect the legitimate interests of other nations to regulate lawfully organized foreign entities and to oversee purely local activities.

B. *Cross-Border Jurisdiction Generally*

In addition to our recommendation with respect to the Commission's approach on substituted compliance and mutual recognition, the Coalition believes that the Commission's policies on its cross-border jurisdiction are generally heading in the wrong direction. In particular, it is our view that the Commission's regulatory policies increasingly capture foreign swaps activities and participants without considering the potential impacts on fair and effective global financial markets. Consistent with the primary focus of the Commission's Project KISS initiative, it is our view that economic effects should be at the center of the Commission's actions when it contemplates new proposals and guidance regarding its extraterritoriality authority. The Commission's misdirection problem is best evidenced by the Commission's 2016 proposal titled *Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants* (the "**New Proposed Cross-Border Rule**"),[64] which seeks to expand the scope of the Commission's final cross-border guidance.[65] If adopted, this proposal would have profound effects on the ability of derivatives end-users to efficiently and effectively do business abroad. The Coalition provided comments to the Commission in response to its proposal noting that it would further tilt against the interests of U.S. commercial end-users operating abroad.[66] Among other things, the New Proposed Cross-Border Rule would introduce the concept of a "foreign consolidated subsidiary" ("**FCS**") to identify those non-U.S. persons whose swap activities present "a greater supervisory interest relative to other non-U.S. market participants."[67] While well-intended, the over-breadth of the

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[63] Statement of CFTC Commissioner J. Christopher Giancarlo, Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties, (Mar. 16, 2016), *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/giancarlostatement031616.

[64] CFTC Proposed Rule, *Cross-Border Application of the Registration Thresholds and External Business Conduct Standards Applicable to Swap Dealers and Major Swap Participants*, 81 Fed. Reg. 71946 (Oct. 18, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-10-18/pdf/2016-24905.pdf.

[65] CFTC's Final Cross-Border Guidance at 45355-74.

[66] New Proposed Cross-Border Rule at 45921; Coalition Comment Letter *available at* https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61067&SearchText=.

[67] The Commission's New Proposed Cross-Border Rule expressly defines "FCS" to mean "a non-U.S. person in which an ultimate parent entity that is a U.S. person has a controlling financial interest, in accordance with U.S. GAAP, such that the U.S. ultimate parent includes the non-U.S. person's operating results, financial position and statement of cash flows in the U.S. ultimate parent entity's consolidated financial statements, in accordance with U.S. GAAP." *See* CFTC New Proposed Cross-Border Rule at 71950. *See also* CFTC Final Rule, *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants-Cross-Border Application of the Margin Requirements*, 81 Fed. Reg. 34817, 34847-48 (May 31, 2016) *available at* https://www.gpo.gov/

proposed rule threatens end-users' ability to engage in hedging transactions when they offer their products and services abroad. In particular, the New Proposed Cross-Border Rule would count the swaps activities of an FCS against the registration thresholds for swap dealers and major swap participants, thereby requiring any non-U.S. person who deals with an end-user's FCS affiliate to account for all of its swaps activities and assess whether it meets CFTC registration thresholds.[68] Despite having no connection to the United States, the non-U.S. person, if having exceeded a Commission registration threshold, would be subject to Commission regulation by virtue of dealing with an end-user's FCS affiliate.[69]

As noted in our comment letter to the New Proposed Cross-Border Rule, the introduction and implementation of the FCS concept would effectively have three significant, adverse impacts on U.S. businesses with overseas operations. First, it would put U.S. end-users operating in foreign jurisdictions at a significant disadvantage thereby preventing them from being competitive with foreign firms in domestic and foreign markets—both in terms of reduced liquidity and in terms of competition relative to their foreign counterparts. U.S. end-users would likely face increased costs of hedging in foreign jurisdictions where local counterparties are generally used for hedging and would be placed at a disadvantage over their non-U.S. competitors. Second, using the FCS concept for these purposes would have a reductive impact on market liquidity globally—hindering economic growth and curtailing vibrant financial markets. Third, the implementation of the FCS concept would likely create confusion as to the Commission's oversight and regulation of purely non-U.S. affairs and activities, and may lead to retaliatory action by foreign regulators. For all of these reasons, we respectfully request that the Commission refrain from moving forward with the FCS concept in this context and the New Proposed Cross-Border Rule generally. Instead, we ask that the Commission carefully consider the concerns of multinational Main Street businesses that use swaps and other derivatives to hedge commercial risks outside of the United States and the potential further drag that the new rule (if adopted) would have on the American economy.

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fdsys/pkg/FR-2016-05-31/pdf/2016-12612.pdf, where the Commission uses a similar definition for FCS but does not refer to the term "person", but instead uses the term "covered swap entity."

[68] New Proposed Cross-Border Rule at 71954-56.

[69] *Id*.

VI. CONCLUSION

Thank you in advance for your consideration of the Coalition's input as part of the Commission's Project KISS initiative. Please contact Michael Bopp at 202.955.8256 or at mbopp@gibsondunn.com if you have any questions regarding our comments or require any additional information on any of the topics discussed herein.

Respectfully submitted,

The Coalition for Derivatives End-Users

cc: Hon. J. Christopher Giancarlo, Chairman, Commodity Futures Trading Commission
Hon. Brian D. Quintenz, Commissioner, Commodity Futures Trading Commission
Hon. Rostin Benham, Commissioner, Commodity Futures Trading Commission